Dual Temp Company, Inc. *and* Steamfitters Local 420 a/w United Association of Plumbers and Pipefitters, AFL–CIO *and* Sheet Metal Workers' International Association, Local No. 19

Dual Temp Company, Inc. *and* Sheet Metal Workers Local Union No. 19, a/w International Association of Sheet Metal Workers, AFL–CIO and Steamfitters Local 420, and Plumbers Local 690, both a/w United Association of Plumbers and Pipefitters, AFL–CIO and International Brotherhood of Electrical Workers Local 375, a/w IBEW. Cases 4–CA–23191, 4–CA–23209, 4–RC–18418, and 4–RC–18421

September 30, 1996

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On June 25, 1996, Administrative Law Judge Karl H. Buschmann issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and the Respondent filed an answering brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt his recommended Order.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Dual Temp Company, Inc., Allentown, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[Direction of Second Election omitted from publication.]

[1] The Respondent also filed cross-exceptions. Inasmuch as Sec. 102.46(e) of the Board's Rules and Regulations provides for the filing of cross-exceptions by "[A]ny party who has not previously filed exceptions," we have rejected the Respondent's cross-exceptions as improperly filed.

[2] The judge erroneously found that Robert Kuhns was laid off a few weeks after a more-skilled employee named Shawn Fillman. In so finding, the judge apparently confused Shawn Fillman, a lesser-skilled employee who was laid off before Kuhns, with Richard Fillman who possessed more skill and received higher pay than Kuhns and who was laid off several weeks after Kuhns. This error does not affect our decision.

[3] In order to conform the language of the Order and notice, we shall modify the notice by substituting the phrase "in any like or related manner" for the phrase "in any other manner."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees about their union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

DUAL TEMP COMPANY, INC.

William Slack, Esq., for the General Counsel.
Jeffrey L. Braff, Esq. (Cohen, Shapiro, Polisher, Shiekman & Cohen), of Philadelphia, Pennsylvania, for the Respondent.
Bruce E. Endy, Esq. (Spear, Wilderman, Borish, Endy, Spear & Runckel), of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. These cases were tried in Philadelphia, Pennsylvania, on July 25 and 26, 1995, on an order, dated June 26, 1995, reconsolidating cases and scheduling consolidated hearing. The cases contain allegations of unfair labor practices and also raise objections to conduct affecting the election among the Respondent's employees. The unfair labor practice charges in Case 4–CA–23191, filed on October 14, 1994, by Steamfitters Local 420, a/w United Association of Plumbers and Pipefitters, AFL–CIO and the charges, filed by Sheet Metal Workers Local Union No. 19 in Case 4–CA–23209, allege that Dual Temp Company, Inc. (the Respondent), unlawfully interrogated an employee and discharged an employee because of his union support.

Pursuant to a Stipulated Election Agreement executed on August 22, 1994, by the Respondent and four Unions, who had filed representation petitions,[1] an election was held on

[1] Sheet Metal Workers Local Union No. 19 on July 22, 1994, in Case 4–RC–18418, Steamfitters Local 420 and Plumbers Local 690 on July 28, 1994, in Case 4–RC–18421, as amended on August 19,

September 22, 1994, in a unit described as all full-time and regular part-time employees working out of the Employer's Allentown, Pennsylvania facility (G.C. Exh. 1(c)). The majority of votes counted were against union representation (G.C. Exh. 1(d)(D)). On September 26, 1994, the Unions filed objections to conduct affecting the results of the election alleging (G.C. Exh. 1(o)):

> 1. On or about Tuesday, September 20, 1994 the employer required all of its employees to attend an in-plant meeting and unlawfully polled the employees as to their union affiliations by requesting each of them wear a "Vote No" button. This conduct was intended to coerce the employees by requiring them to publicly acknowledge their support for the union or give the appearance of being opposed to the union in the coming election.
>
> 2. On or about August 25, 1994 the employer's son and another foreman told several of the employees that they knew to be union supporters to "keep their tools close to the door" a remark intended to convey the idea that they might be laid off because of their support for the union.

The Respondent filed timely answers in which the jurisdictional allegations and the supervisory status of certain officials were admitted and in which the substantive allegations of unfair labor practices are denied.

On the entire record[2] in this case, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel, the Unions, and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Dual Temp Company, Inc., a Pennsylvania corporation located in Allentown, Pennsylvania, is engaged in the installation, construction, and service of heating, ventilation, and air-conditioning systems. With purchases of goods valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania, the Respondent is admittedly an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Unions, Sheet Metal Workers' International Association, Local No. 19, and Steamfitters Local 420, a/w United Association of Plumbers and Pipefitters, AFL–CIO are labor organizations within the meaning of Section 2(5) of the Act.

II. FACTS

Dual Temp Company, Inc. generally maintained a work force consisting of about 55 employees but never more than 78. Most of the employees worked as sheet metal workers who install and service heating and air-conditioning systems. Several of the employees have a special license to be welders or electricians, others are classified as laborers, apprentices, and mechanics. Most of the employees are cross-trained who possess the various necessary skills to work in the Respondent's business. The Unions, including Local 19, have attempted without success to organize the Respondent's work force as early as 1989. The Union lost the election held in 1989. It filed objections to the election which were resolved a year or two later. Thereafter, the Union picketed the Company's jobsites from time to time and passed out union literature to the employees. The Union also filed complaints with state and Federal agencies challenging the Company's compliance with prevailing rate laws. Then in early 1994, David Noel, the Company's president, contacted William Dorwood, organizer for Local 19, and expressed his interest in the Union's training program. The Union explored union representation with Noel and the possibility of signing a collective-bargaining agreement. However, Noel rejected these proposals. The Union then filed a representation petition in July 1994 which the other Unions joined. The campaign among the employees involved meetings and mailings of information about the benefits of a union. Among the campaign literature from the Union to the employees were letters written by two employees, including a letter written by Robert Kuhns. (Tr. 22, G.C. Exhs. 3 and 4.) The Respondent's president, Noel, testified that employees had provided him with copies of the union campaign literature including the employee letters. (Tr. 379.)

The Company responded to the Union's campaign with a vigorous campaign of its own. It conducted frequent meetings with employees. During in-plant meetings with groups of 8 or 10 employees, the Respondent offered to the employees candy and "Vote No" buttons from the table in the conference room. Management representatives who had remained in the room were able to observe which of the assembled employees took a "Vote No" button and "Vote No" candy. Two employees, Dennis Ritton and Brian Meck, who had attended these meetings testified that President David Noel spoke at the meetings against the Union, and that the employees took the candy and several picked up "Vote No" buttons.

Ritton also testified that Kevin Berger, the son of Don Berger, one of the owners of the Company, suggested that union supporters would lose their jobs. While Ritton was working at the Howard Eyre School site during the time prior to the election, the employees had just taken a break when the following conversation occurred in the presence of a supervisor, Todd Shook (Tr. 59–60):

> It was a break time, which we usually took in the cafeteria—or the kitchen area—I'm sorry. And when everybody came out for break to have their snack or whatever, Kevin Berger said, "All of you pieces of shit that are thinking of joining the Union can have your tools ready by the door because you're going to be replaced."

The Respondent interrogated Brian Meck, a service technician, about the Union. He had attended a union meeting on September 5, 1994. On the following day, Meck reported as usual to the dispatcher's office and was about to leave for his assignment when he encountered Jerry Kuhns, the parts

1994, to add International Brotherhood of Electrical Workers, Local 375.

[2] The Respondent's motion to correct transcript is granted, but the Respondent's posthearing motion to reopen record to add affidavit of Dennis Ritton is denied.

manager. According to Meck's credible[3] testimony, the following exchange occurred (Tr. 31):

> Jerry wanted to know how the Union meeting had gone the prior day, and how I was going to vote in the Union election. He also wanted to know if I believed everything that the Union was telling people at the Union meeting. He wanted to know if I believed all the lies that were being told.
>
> At that point in time I just became a little aggravated. I told him I would appreciate him not minding my business, that he should basically mind his own business. He persisted; I walked away.

Kuhns, however, followed, as described by Meck (Tr. 32):

> Down the steps, out to the concrete walkway, down the steps, and I stopped at the corner of the building, and he was still going on about how I was going to vote in this election. He wanted to know how I was going to vote in this election. I told him I knew which way I was going to vote, in fact, because I had made my mind up right then and there.

Following the election on September 22, 1994, where the Union lost, several of the employees resigned their employment with the Respondent, others were laid off or were fired. For example, six employees left voluntarily on September 23, 1994, and two employees, Shawn Fillman and David Alamo, were laid off on that day. A few days later, three more employees left their jobs. In October 1994, two employees, Brian Meck and Manuel Dela Cruz, were fired and Robert Kuhns and Robert Hinkle were laid off October 11, 1994. In November 1994, six more employees were fired or laid off. (Tr. 175–176, G.C. Exh. 13.) Only the layoff of Robert Kuhns is alleged as unlawfully discriminatory, because of his union support.

III. THE UNFAIR LABOR PRACTICES

The interrogation. Supervisor Kuhns' interrogation of employee Meck 2 or 3 weeks prior to the election is not disputed. The Respondent, however, argues that Kuhns' version of the scenario, as reflected in his affidavit, be credited rather than the recollection of Meck who testified under oath. As already stated, I have observed Meck's demeanor as a witness and I have no reason to doubt his credibility. Even though the parties stipulated that Kuhns' testimony, would have been consistent with his affidavit, I had no opportunity to observe his demeanor.

Interrogation of an employee is unlawful only if it is coercive, considering the totality of the circumstances. Here, Kuhns was not Meck's immediate supervisor, nor was he among the highest executives. Nevertheless, the conduct occurred during a union campaign which the Company strongly opposed. Kuhns was persistent in his questioning and repeatedly demanded to know how Meck would vote. Meck was obviously disturbed by the incident and attempted to avoid a further confrontation. Such conduct was clearly coercive and therefore violated Section 8(a)(1) of the Act.

[3] Kuhns did not testify but in his affidavit he admitted to a conversation with Meck on that day and inquiring how he made out at the meeting.

The layoff. The Respondent concedes that Robert Kuhns was a highly visible union advocate and that the Company was well aware of his prounion position. (R. Br. at 1.) Indeed, the Respondent's president referred to Kuhns as the Union's main organizer and the Respondent stipulated that he was a leading advocate of the Union. (Tr. 100, 350.) But the General Counsel's position that Kuhns' layoff was motivated by antiunion animus is highly contested. According to the Respondent, his layoff was the result of insufficient work to keep all 61 employees on the payroll. Within weeks following the election, approximately 20 employees left their employment either voluntary or through layoffs and discharges. Only two employees were hired; one on October 3 and another on November 7, 1994.

Robert Kuhns, a sheet metal mechanic since August 25, 1986, was laid off on October 11, 1994, or approximately 3 weeks after the election. He had been working in the Company's fabrication shop in August 1994. During a brief encounter with Don Berger, one of the Respondent's management officials, 1 or 2 days before the September 22 election, Berger offered Kuhns a "Vote No" button. Berger expressed his disappointment when Kuhns refused the offer. One day after the election Kuhns and Robert Hinkle, another sheet metal mechanic, were assigned to work on the Company's PP&L projects. After that assignment, both men worked on another short-term project at Osram Sylvania. Kuhns still made no secret of his continued union support by wearing a union hat to work. It was also rumored that Kuhns was planning to quit his job for one with Local 19. The rumor had reached the Company's president who asked Kuhns about it while he had come to Noel's office to complain about a defective truck. Kuhns replied: "If something better comes on, I'm afraid so, I will be." (Tr. 108.)

When Kuhns and Hinkle finished the Sylvania job on October 10, 1994, they were laid off effective October 11, 1994.

The General Counsel argues that Kuhns who had never been laid off before and who was considered a solid employee with 8 years of seniority should have been reassigned to another job, because the Respondent kept employees with similar skills and with less seniority working on other projects.

In this regard, Noel testified as follows (Tr. 350):

> And he specifically told me that he was just waiting on a call from Bill Dorward. So I knew that his intention was to not stay. I knew that firsthand. So that certainly played into my decision. Why should I look to reassign him somewhere, knowing he's going to leave anyway. . . . It was common knowledge, I mean, everybody in the company knew. I couldn't possibly have not known. . . . Well, at that point in time I laid him off, he had told me he was going to leave. Up until he told me, just by virtue of the fact that so many other people left immediately after the election ostensibly to take Union positions meaning working with a Union contractor on another job somewhere else, not for Dual Temp, it was inconceivable to me that the guy who to everybody's appearances, seemed to have been the main organizer within the company hadn't yet left.

Kuhns had indeed called Local 19 and spoke to Dorward 1 day after the election, asking him for a job. Nevertheless, Kuhns became unemployed after his layoff. He found a union job on October 31, 1994. The Respondent contacted Kuhns twice, once in November and again in December about a job. By letter of December 22, 1994, Berger notified Kuhns that work was available for him and to respond within 5 days. Kuhns failed to respond within that time.

The record fails to show that the Respondent discriminated against Kuhns because of his union activity. To be sure, the General Counsel has established Kuhns' union activity, the Respondent's knowledge of Kuhns' leading role as a union activist, as well as the Respondent's antiunion animus. But I am not convinced that the layoff was motivated by union animus. Kuhns was only one among several employees who were laid off. For example, employees David Alamo and Shawn Fillman were laid off on September 23, 1994, 1 day after the election when approximately six other employees left voluntarily. Kuhns and Robert Hinkle were both laid off in October and a few more employees were laid off in November 1994. Yet Kuhns is the only one whose layoff is alleged as discriminatory.

The General Counsel argues that Kuhns had more seniority than several employees who were retained on other projects, and that Kuhns should have been reassigned to their jobs. However, the record shows that Fillman laid off in September and Muth, an employee laid off in November, were more skilled than Kuhns and that seniority was only one of several factors which the Company takes into consideration. Of significance, according to the Respondent, was Kuhns' expressed intention to leave the Company for a better job as soon as possible. Under these circumstances, the Respondent properly argues that replacing an employee still working at an ongoing project in order to accommodate Kuhns whose assignment was finished would be unreasonable.

Even if the General Counsel had established a prima facie case of an 8(a)(3) violation, the Respondent has successfully demonstrated that Kuhns would have been laid off even in the absence of his union activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Although it is true that once Kuhns' work at the Sylvania project was finished, the Respondent could have reassigned him to another project such as the St. Luke job, it was a plausible business judgment for the Respondent to lay off Kuhns who had finished his assigned work and who had indicated his intentions to leave the Company for another position as soon as he could find one.

The record does not show, as argued by the General Counsel, that Kuhns was singled out or selected for layoff. Other employees were laid off before Kuhns. He remained employed until his assignment at the Sylvania project was completed. To reassign Kuhns to another job might have affected another employee who had no intention of leaving the Company. I accordingly dismiss this allegation in the complaint.

IV. THE OBJECTIONS

According to the Regional Director's report on objections to the election, the Employer unlawfully polled the employees as to their union affiliations by requesting each of them to wear a "Vote No" button. The record shows that the Respondent's president conducted meetings with about 10 employees at a time 2 days before the election. During a prepared speech to the assembled group about the Union, Noel offered them "Vote No" buttons and candy with the writing "Vote No." The buttons and the candy were laying on the conference table. As Noel interrupted his speech, saying, "Help yourself to same candy or some buttons, gentlemen," several employees took the candy and others took both. It was clear that those employees could be observed by management. The record reveals another incident. Donald Berger saw Kuhns in the bathroom 1 day before the elections without a "Vote No" button. Berger removed his button and offered it to Kuhns who politely declined the offer.

Citing several cases where similar conduct was held unlawful, the Respondent argues that the employees here were not approached individually nor with any coercion whatsoever.

In agreement with the Union's position, I find that the circumstances here were sufficiently coercive to interfere with the employees' Section 7 rights. In *Houston Coca Cola Bottling Co.*, 256 NLRB 520 (1981), the Board held that "repeatedly offering the 'Vote No' buttons and observing who accepted or rejected them (the Company] in effect polled the employees about their sentiments regarding the Union." Here, the Employer did not merely make the buttons available to employees who asked for them. *Wm. T. Burnett & Co.*, 273 NLRB 1284 (1984). Here, the employees assembled in several groups of 10 and were required to listen in a captive audience atmosphere to the Employer's views about the Union. They were observed as "Vote No" buttons were offered as sweetened by "Vote No" candy. Under these circumstances, I agree with the objection raised by the Union.

The other incident which became the subject of an objection occurred at the Eyer School project shortly before the election in the presence of about nine employees. According to the testimony of former employee Dennis Ritton, Kevin Berger, son of the owner, said to the employees as they took a break in the kitchen area (Tr. 59): "All of you pieces of shit that are thinking of joining the Union can have your tools ready by the door because you're going to be replaced." Supervisor Todd Shook added, "Yeah, Martin . . . . You too Ritton, that goes for your guys." Both, Shook and Berger, testified that they did not recall making these statements. (Tr. 60.)

I found those qualified denials unconvincing and regard Ritton's testimony generally credible based on his demeanor. But I find that Ritton's testimony with respect to Shook's participation in the incident to be inconsistent with his affidavit, dated November 7, 1994. According to his affidavit, Shook was present but said nothing. I accordingly find that Berger was the only one who threatened the employees about their union support.

Kevin Berger was admittedly not a supervisor, and the question whether he was or acted as the Respondent's agent is not readily apparent. Don Berger, his father, is a part owner of the Company. His son was employed as a regular sheet metal mechanic and occasionally as a crew leader. He had been fired in 1989 because of his attitude and rehired in 1993. He does not live in his parents' household. He voted in the election and was generally considered a member of the Respondent's work force. The only indicia of agency status was his relationship with the Company's owner. Under these circumstances, I find that he acted on his own and that he did not possess sufficient apparent authority to be considered

part of management. I accordingly overrule the Union's objection on this issue.

The election need not be set aside if the finding that the Employer unlawfully polled the employees by offering them the "Vote No" buttons is considered de minimus and would not have affected the results of the election. In *Chas v. Weise Co.*, 133 NLRB 765 (1961), the Board set aside the election based on a finding that "Vote No" badges were made available to the employees which placed the employees in the position of declaring themselves as to union preference just as if they had been interrogated. On the other hand, in *Black Dot, Inc.*, 239 NLRB 929 (1978), the Board was faced with a similar situation. The employer made antiunion buttons available, but, contrary to the *Weise* situation, where the employer and supervisors were involved in the distribution of buttons, in *Dot* supervisors were completely absent from the distribution process. The Board concluded that the Employer's conduct in merely making buttons available to employees on a voluntary basis, in the absence of supervisory involvement in the distribution process and unaccompanied by independent coercive conduct, does not require that the election be set aside.

Here, of course, supervisors were involved, especially during required in-plant meetings. I therefore conclude that the circumstances here were more than a de minimus violation, requiring the setting aside of the election.

CONCLUSIONS OF LAW

1. The Respondent, Dual Temp Company, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Unions, including Local 19, Local 420, Local 690, and Local 375, are labor organizations within the meaning of Section 2(5) of the Act.

3. By coercively interrogating an employee, the Respondent violated Section 8(a)1) of the Act.

4. The Union's objection to the election is sustained insofar as the Employer unlawfully polled the employees during in-plant meetings by offering them "Vote No" buttons and "Vote No" candy.

REMEDY

Having found that the Respondent has engaged in certain additional unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having sustained the Union's objections to the election on September 22, 1994, in Cases 4–RC–18418 and 4–RC–18421, the election should be set aside and the cases should be remanded to the Regional Director for Region 4 for the purposes of conducting another election.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Dual Temp Company, Inc., Allentown, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating its employees about their union activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Allentown, Pennsylvania plant copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 14, 1994.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election held on September 22, 1994, in Cases 4–RC–18418 and 4–RC–18421 be set aside and that these cases (severed from Cases 4–CA–23191 and 4–CA–23209) be remanded to the Regional Director for Region 9 for the purposes of conducting a second election.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."